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No. 83-493

RESPONDENT E. STEVENS  
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**In The**  
**Supreme Court of the United States**  
**October Term 1983**

**AMERADA HESS CORPORATION**  
**and L. A. STRICKLIN,**  
*Petitioners,*  
**vs.**

**DAVID R. GREEN,**  
*Respondent.*

**On Petition For A Writ Of Certiorari To The United**  
**States Court of Appeals For The Fifth Circuit**

**RESPONDENT'S BRIEF IN OPPOSITION TO**  
**PETITION FOR A WRIT OF CERTIORARI**

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**RESPONDENT'S BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI**

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Respondent, David R. Green, respectfully requests that this court deny the Petition of Amerada Hess Corporation and L. A. Stricklin for a Writ of Certiorari seeking review of the decision in this case, of the United States Court of Appeals for the Fifth Circuit entered on June 16, 1983.

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**OPINIONS BELOW**

The unpublished opinions and order of the United States District Court, Southern District of Mississippi, Eastern Division, are accurately reproduced in petitioners' Appendices B, C and D.

The opinions, and mandate (not issued, pending this court's ruling) of the United States Court of Appeals, Fifth Circuit, *Green v. Amerada Hess Corp.*, 707 F. 2d 201, reh. den. 714 F. 2d 137 (5th Cir. 1983), are accurately reproduced in petitioners' Appendices A, E and F.

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## **JURISDICTION**

This court has jurisdiction of this case pursuant to 28 U. S. C. § 1254(1), to consider whether to review the opinion of the United States Court of Appeals, Fifth Circuit, herein. However, as discussed below, Respondent respectfully avers that this is not a case which appropriately falls into any of the categories of Rule 17, Rules of the Supreme Court of the United States, for which this court exercises its discretion to review.

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## **STATUTORY PROVISIONS INVOLVED**

Respondent Green (hereinafter plaintiff) admits that this case involves the following statutes of the United States: 28 U. S. C. § 1332(a) and (c) and 28 U. S. C. § 1441 (a) and (b), which are accurately set forth on pages two through four of the petition.

## STATEMENT OF THE CASE

Petitioners' statement of the case consists of contradicted facts, disputed assertions, and is unduly slanted to fit their arguments, which are debatable. Since this case is before this court only to consider whether to review the Fifth Circuit's ruling on an issue of law, little space will be given herein to re-arguing the factual issues which are not pertinent to this appeal. Not all of Plaintiff's causes of action arise from his discharge. The court is respectfully referred to the Fifth Circuit's opinion at 707 F. 2d 201 (Petitioners' Appendix A), for a full and accurate statement of the factual circumstances herein.

Plaintiff (Green) brought suit against Amerada Hess and one of its corporate officers (Stricklin), in a Mississippi state court, alleging various torts. Defendant Amerada Hess alone removed the case to federal court, claiming that Stricklin had been fraudulently joined as a defendant in order to defeat diversity jurisdiction. (Plaintiff and Stricklin both reside in Mississippi.) The district court held a lengthy evidentiary hearing and received evidence from both sides. Despite the allegations of the complaint, the court ruled that Stricklin had not participated in the allegedly tortious acts and could not be held personally liable. Thus, the court ruled, he had been fraudulently joined as a party. The court retained jurisdiction, dismissed Stricklin, and then dismissed the claims against Amerada Hess.

The Fifth Circuit reversed, holding that the district court had erred in holding a full evidentiary hearing on the fraudulent joinder issue. The court relied upon a prior Fifth Circuit case which held that when fraudulent

joinder was alleged, the court could not resolve disputed issues of substantive fact. The court then held that there was a possibility that the state court would permit plaintiff to recover against Stricklin, and that he had therefore not been fraudulently joined. Defendants have petitioned the Supreme Court for a writ of certiorari.



## REASONS FOR DENYING THE PETITION

- I. The opinion of the Fifth Circuit in this case concerning removal procedure where fraudulent joinder of a resident defendant is alleged, is based upon, and consistent with, the well-established precedents of this court.

The federal courts are not common law courts of general jurisdiction. *Charest v. Olin Corporation*, 542 F. Supp. 771, 773 n. 2 (N. D. Ala. 1982).

The removal jurisdiction of federal courts is strictly limited to specific statutory authority expressed by the Congress, pursuant to Article III, United States Constitution. *American Fire & Casualty Co. v. Finn*, 341 U. S. 6, 9-11, 95 L. Ed. 702, 706-707, 71 S. Ct. 534, 538 (1951); *Shamrock Oil & Gas Corporation v. Sheets*, 313 U. S. 100, 108-109, 85 L. Ed. 1214, 1219, 61 S. Ct. 868, 872 (1941).

The burden of proving "fraudulent joinder" of a resident defendant is on the removing party alleging the fraud. *Wilson v. Republic Iron & Steel Co.*, 257 U. S. 92, 97, 66 L. Ed. 144, 148, 42 S. Ct. 35, 37 (1921); *Capehart-Creager v. O'Hara & Kendall Aviation*, 543 F. Supp. 259, 263 (W. D. Ark. 1982).

The allegation in the removal petition must be pleaded and proven with sufficient certainty to compel the inescapable conclusion that the joinder was a fraudulent device to prevent removal. *Chicago, Rock Island & Pacific Railway Co. v. Whiteaker*, 239 U.S. 421, 425, 60 L. Ed. 360, 364, 36 S. Ct. 152, 153 (1915); *Kentucky v. Powers*, 201 U.S. 1, 34, 50 L. Ed. 633, 648, 26 S. Ct. 387, 398 (1906).

Plaintiff's actual motive for joining a resident defendant is immaterial. *McAllister v. Chesapeake & Ohio Railway Co.*, 243 U.S. 302, 310-311, 61 L. Ed. 735, 741, 37 S. Ct. 247, 277 (1917); *Illinois Central Railroad Co. v. Sheegog*, 215 U.S. 308, 314, 54 L. Ed. 208, 211, 30 S. Ct. 101, 102 (1909).

The joinder is not fraudulent even if the sole reason for it was to destroy diversity, provided there is in good faith a cause of action stated in the complaint against those joined. *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 189, 76 L. Ed. 233, 239, 52 S. Ct. 84, 87 (1931); *Wilcox v. Kansas City Southern Railway Co., Inc.*, 534 F. Supp. 106, 108 (W. D. Ark. 1981).

In order to determine whether the joinder was fraudulent, the court has only to consider whether the complaint shows a real intention to get a joint judgment, with apparent grounds therefor and not whether the complaint might be attacked by special demurrer. *Chicago, Rock Island & Pacific Railway Co. v. Schwyhart*, 227 U.S. 184, 194, 57 L. Ed. 473, 478, 33 S. Ct. 250, 251 (1913).

The test of such controversy, as this court has frequently said, is the cause of action stated in the complaint. *Alabama Great Southern Railway Co. v. Thompson*, 200 U.S. 206, 217, 50 L. Ed. 441, 447, 26 S. Ct. 166, 168 (1906).

The question is determined by the plaintiff's pleading. *Pullman Co. v. Jenkins*, 305 U. S. 534, 538, 83 L. Ed. 334, 338, 59 S. Ct. 347, 349 (1939).

The defendant has no right to say that an action shall be several which the plaintiff elects to make a joint cause of action. *Cincinnati, New Orleans & Texas Pacific Railway Co. v. Bohon*, 200 U. S. 221, 226, 50 L. Ed. 448, 451, 26 S. Ct. 166, 168 (1906).

A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to a final decision in his own way. The cause of action is the subject matter of the controversy, and that is, for all purposes of the suit, whatever the plaintiff declares it to be in his pleadings. *Chicago, Burlington & Quincy Railway Co. v. Willard*, 220 U. S. 413, 427, 55 L. Ed. 521, 527, 31 S. Ct. 460, 464 (1911).

Whether there was a joint liability or not was a question to be determined upon the averments of the plaintiff's statement of his cause of action, and is a question for the state court to decide. *Chicago, Rock Island & Pacific Railway Co. v. Dowell*, 229 U. S. 102, 113, 57 L. Ed. 1090, 1096, 33 S. Ct. 684, 686 (1913).

As discussed below, the parties do agree that the cases hold that the proper procedure on removal, where fraudulent joinder is alleged, is the same as that used in summary judgment. Petition at pp. 28, 29 n. 2; and see 1A J. Moore, B. Ringle, *Federal Practice*, ¶0.161[2] (1983), and cases cited in annotations therein.

As with a party resisting summary judgment, the plaintiff resisting removal is entitled to have all infer-

ences drawn in a light most favorable to him. *United States v. Diebold*, 369 U. S. 654, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962). In making its determination the court should not resolve issues of fact, or assess the probative value of the evidence. *United States v. An Article of Food*, 622 F. 2d 768, 771, 773 (5th Cir. 1980).

The removing party, like the summary judgment movant, has the burden of establishing the absence of a genuine material issue of fact. *Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 157, 26 L. Ed. 2d 142, 154, 90 S. Ct. 1598, 1608 (1970). Whether it appears that plaintiff will or will not prevail on the merits is not to be considered. *Scheuer v. Rhodes*, 416 U. S. 232, 236, 40 L. Ed. 2d 90, 96, 94 S. Ct. 1683, 1686 (1974).

In the case of *Edwards v. E. I. duPont deNemours & Co.*, 183 F. 2d 165, 168-169 (5th Cir. 1950), the court stated,

Questions of . . . individual liability . . . go to the merits of the case and do not affect the removal jurisdiction of the federal court.

Likewise, in the case of *Howard v. General Motors Corporation*, 287 F. Supp. 646, 650 (N. D. Miss. 1968), the court said,

"Jurisdiction on removal is not dependent upon ultimate resolution of factual issues in favor of the non-diverse party. The issues are to be tried in the state court having original jurisdiction and not to be determined in a removal proceeding."

**II. The Fifth Circuit below correctly applied the law in conformity with applicable precedent, and this case raises no issues sufficient to justify certiorari.**

This court will exercise its discretion to review a decision of one of the federal courts of appeals by writ of

certiorari only where there are special and important reasons for so doing. An appropriate ground for granting a writ of certiorari exists, for example, where there is a conflict among the Courts of Appeals or where there is an important, unsettled principle of federal law which requires resolution by this court. Supreme Court Rule 17.<sup>1</sup>

Petitioners (hereinafter known as "defendants"), in apparent recognition of the need to present a special ground for review, argue that the decisions of the Fifth Circuit in the present action and in *B., Inc. v. Miller Brewing Co.*, 663 F. 2d 545 (5th Cir. 1981), are in conflict with principles previously established by the courts. The fundamental problem with defendants' petition is that, in order to make such an argument, it is necessary to misread and/or misstate the ruling below as well as the prior ruling in *B., Inc. v. Miller Brewing Co.* In fact, the Fifth Circuit properly resolved this case under well settled principles of law.

In the present action, plaintiff asserts a number of claims against the corporate defendant and also seeks personal relief against defendant Stricklin, a corporate officer. Defendants allege that Stricklin was fraudulently joined in order to defeat diversity jurisdiction. It was held by the district court below that Stricklin's personal liability would depend upon some personal participation by Stricklin in the tortious acts alleged. The trial court

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<sup>1</sup>Even in such cases, review is entirely a matter of discretion. *Brown Transport Co. v. Atcon, Inc.*, 439 U. S. 1014 (1978) (White, J., dissent); *Singleton v. Comm. of Internal Revenue*, 439 U. S. 940 (1978) (Blackmun, J., dissent); *Watt v. Alaska*, 451 U. S. 259, 275 (1981) (Stevens, J., concurring).

held an evidentiary hearing to determine whether there was any participation by Stricklin in the acts alleged.

Defendants offered affidavits from corporate officers and/or employees denying any participation by Stricklin. Plaintiff offered several items of evidence tending to establish participation by Stricklin.<sup>2</sup> Plaintiff's evidence included a transcript of a telephone conversation between plaintiff's former attorney and Donald Miller, one of the affiants whose affidavit was offered by defendants, who said he thought Stricklin had ordered plaintiff's discharge. The deposition of David Pritchard, another corporate affiant, who testified that he thought he discussed plaintiff's discharge with Stricklin prior to the discharge, was offered. Plaintiff also offered the deposition of Paul Allen, who testified that at a meeting subsequent to the discharge, a supervisory employee of Amerada Hess said that Stricklin had participated in the discharge. In addition, an interrogatory answer of Amerada Hess was offered, naming Stricklin as a corporate officer who was involved in the discharge.<sup>3</sup> The District Court believed defendants' evidence, discredited plaintiff's evidence, and ruled that Stricklin had been fraudulently joined. The Fifth Cir-

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<sup>2</sup>This court ordinarily does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U. S. 220, 227, 69 L. Ed. 925, 926, 45 S. Ct. 496, 497 (1925). If this court were so inclined, however, it must be emphasized that the evidence contained in the Appendix filed by petitioners is not all of the evidence submitted below, and was contradicted by evidence of plaintiff.

<sup>3</sup>As pointed out to the Court of Appeals, because of repeated assurances by the district court that it was not yet going to decide the factual issue on the merits, plaintiff did not offer all available evidence on this issue.

cuit reversed. *Green v. Amerada Hess Corp.*, 707 F. 2d 201 (5th Cir. 1983).

The ruling below followed the prior decision in *B., Inc. v. Miller Brewing Co.*, 663 F. 2d at 549-551. Thus, in challenging the ruling in the present case, defendants attack the ruling in *B., Inc. v. Miller Brewing Co.*, as well. Defendants claim that in both cases, the Fifth Circuit applied a rule of law which, except for certain jurisdictional facts, prevents a court from looking beyond the pleadings to determine whether there has been a fraudulent joinder. Defendants' interpretation of the Fifth Circuit rulings is simply incorrect. It is nevertheless clear from Defendants' Petition (pp. 10, 11-12, 23-24, 40-41) that defendants interpret the Fifth Circuit rulings in an incorrect manner.

In order to understand the ruling below, it is first necessary to understanding the ruling in *B., Inc. v. Miller Brewing Co.*, 663 F. 2d at 549-551. The court in that case first concluded that a defendant who claims fraudulent joinder must prove either that there is no possibility that the plaintiff would be able to establish the cause of action, or that there has been outright fraud in alleging jurisdictional facts, such as the domicile or actual existence of the in-state defendant. 663 F. 2d at 549. Defendants' Petition demonstrates that defendants interpret this two-pronged test as a law/fact distinction, i. e., that the first prong relates solely to law and the second prong relates solely to facts. (Petition at pp. 25-31.) The court in *B., Inc. v. Miller Brewing Co.*, however, did not make such a distinction, and did not limit the first part of its test to purely legal questions.

Rather, the court expressly recognized that the issue should be treated as similar to a motion for summary judgment. Both parties could present affidavits and deposition transcripts, along with the allegations in the pleadings. The factual issues would be resolved in the light most favorable to the plaintiff. If there was no genuine issue of substantive fact, the court could find that a defendant had been fraudulently joined. However, the court could not hold a full evidentiary hearing to resolve a genuinely disputed issue of substantive fact. With respect to certain jurisdictional facts, a full evidentiary hearing would be appropriate. 663 F. 2d at 549-551. Since the procedure for summary judgment was to be followed, plaintiff could not rely on the mere allegations of the pleadings. Fed. R. Civ. P. 56(e). Thus, it is clear that the ruling does not prevent a defendant from attacking false allegations in a pleading. In the present case, the Fifth Circuit merely followed the principles as set out in *B., Inc. v. Miller Brewing Co.*, and held that the lower court had improperly held a full evidentiary hearing to resolve a disputed issue of substantive fact. *Green v. Amerada Hess Corp.*, 707 F. 2d at 205-206. Rather, the issue should have been resolved by summary determination. 707 F. 2d at 204.

Defendants' argument that the court in *B., Inc. v. Miller Brewing Co.*, adopted legal principles in conflict with those established previously by the federal courts is without merit.<sup>4</sup> The very cases relied on by defendants

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<sup>4</sup>The courts of the Second, Third and Eleventh Circuits have cited and followed the *B., Inc.* decision. *Charest v. Olin*

demonstrate that there is no conflict. In *Wecker v. National Enameling Co.*, 204 U. S. 176, 51 L. Ed. 430, 27 S. Ct. 184 (1907), the Court held that a defendant had been fraudulently joined on the basis of *uncontradicted, consistent affidavit evidence which conclusively demonstrated* that there was no basis for a claim against the defendant in question. 204 U. S. at 184-185, 51 L. Ed. at 435-436, 27 S. Ct. at 187-188. Similarly, in *Lobato v. Pay Less Drug Stores*, 261 F. 2d 406, 409 (10th Cir. 1958), and *McLeod v. Cities Service Gas Co.*, 233 F. 2d 242, 246 (10th Cir. 1956), the courts based their rulings upon undisputed evidence. In *Polito v. Malasky*, 123 F. 2d 258, 261 (8th Cir. 1941), the court likewise ruled the evidence to be conclusive.

In fact, several of the cases relied upon by defendants affirmatively demonstrate the correctness of the ruling below. In *Leonard v. St. Joseph Lead Co.*, 75 F. 2d 390, 394-395 (8th Cir. 1935), the court held:

The joinder must have been in bad faith in order to warrant removal. The joinder of a defendant is fraudulent if it is clear that under the law of the state in which the action is brought, the facts alleged by the plaintiff as the basis for the liability of the resident defendant could not create a joint liability

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*Corporation, supra*, 542 F. Supp. at 775 (N. D. Ala. 1982); *Castner v. Exxon Company U. S. A.*, 563 F. Supp. 684, 687 (E. D. Pa. 1983); *Cunard Line Limited v. Abney*, 540 F. Supp. 657, 664 (S. D. N. Y. 1982); *Williamson v. General Finance Co.*, 28 B. R. 276, 284-285 (Bkrtcy. M. D. Ga. 1983). Although defendants cite it as a great departure, according to the most recent Shepard's citator available, no court has criticized the ruling in *B., Inc.* Considering the heavy volume of cases moving through the vast federal judiciary, in the years since that decision, it seems unlikely that such a departure, if it were one, would for so long pass without protest and meet with such wide acceptance.

against him and his codefendant, so that the assertion of a joint cause of action is, as a matter of local law, plainly sham and fraudulent. Such joinder is also fraudulent if the facts alleged in plaintiff's pleading with reference to the resident defendant are shown to be so clearly false as to demonstrate that no factual basis exists for an honest belief on the part of the plaintiff that there is a joint liability. *If there is doubt as to whether, under the state law, a case of joint liability is stated, or if there is doubt whether the allegations with respect to the resident defendant are false, as when that question depends upon the credibility of witnesses and the weight of evidence, the joinder is not to be held fraudulent.*

[Emphasis added.]

Similarly, according to the court in *Dodd v. Fawcett Publications, Inc.*, 329 F. 2d 82, 85 (10th Cir. 1964):

In many cases, removability can be determined by the original pleadings and normally the statement of a cause of action against the resident defendant will suffice to prevent removal. But upon specific allegations of fraudulent joinder the court may pierce the pleadings, *Chesapeake & O. Ry. v. Cockrell*, 232 U. S. 146, 34 S. Ct. 278, 58 L. Ed. 544; *Nunn v. Feltinton*, 5 Cir., 294 F. 2d 450; *Morris v. E. I. Dupont DeNemours & Co.*, 8 Cir., 68 F. 2d 788, consider the entire record, and determine the basis of joinder by any means available, *McLeod v. Cities Serv. Gas Co.*, 10 Cir., 233 F. 2d 242. The joinder of a resident defendant against whom no cause of action is stated is patent sham, *Parks v. New York Times Co.*, 5 Cir., 308 F. 2d 474, and though a cause of action be stated, the joinder is similarly fraudulent if in fact no cause of action exists, *Lobato v. Pay Less Drug Stores, Inc.*, 10 Cir., 261 F. 2d 406. *This does not mean that the federal court will pre-try, as a matter of course, doubtful issues of fact to determine removability; the issue must be capable of summary determination and be*

*proven with complete certainty.* McLeod v. Cities Serv. Gas Co., *supra*.

[Emphasis added.]

*Accord: Smoot v. Chicago, Rock Island and Pacific Railroad*, 378 F. 2d 879, 882 (10th Cir. 1967).

Thus, even the cases relied upon by defendants recognize that a fraudulent joinder claim relating to substantive issues, in order to justify removal, must be capable of summary determination.<sup>5</sup> Removal is not available where there is a disputed issue of substantive fact. The court below merely applied this well settled principle to hold that, because there was a disputed question of fact, the trial court erred in holding an evidentiary hearing and resolving the disputed factual issue. *Green v. Amerada Hess Corp.*, 707 F. 2d at 204-205. The same principles were recited and followed in *B., Inc. v. Miller Brewing Co.*, 663 F. 2d at 549-551. In short, the Fifth Circuit has concluded that as to disputed issues of substantive facts, all doubts must be resolved in favor of the plaintiff. This conclusion is consistent with, and is in fact required by, the cases cited by defendants.

Prior Fifth Circuit rulings compel the same result. In *Keating v. Shell Chemical Co.*, 610 F. 2d 328 (5th Cir.

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<sup>5</sup>Later Eighth and Tenth Circuit cases make even more emphatically apparent the lack of conflict with the decision of the Fifth Circuit herein. *Bolstad v. Central Surety & Insurance Corp.*, 168 F. 2d 927 (8th Cir. 1948); *Town of Freedom, Oklahoma v. Muskogee Bridge Co.*, 466 F. Supp. 75 (W. D. Okla. 1978); also see *Commercial Securities, Inc. v. General Ins. Co. of America*, 269 F. Supp. 398 (D. Oregon 1966) (district courts must not "pre-try" factual issues on a motion to remand); and *Quinn v. Post*, 262 F. Supp. 598, 604 n. 11 and related text (S. D. N. Y. 1967).

1980), the court held that a trial on the merits of a disputed factual issue would be improper in considering a fraudulent joinder issue. Rather, the trial court would only be permitted to determine by "summary judgment or otherwise" that on "facts which are uncontradicted, or impliedly found most favorable to [plaintiff]," there could be no recovery as a matter of law. 610 F. 2d at 333. Similarly, in *Bobby Jones Garden Apartments, Inc. v. Suleski*, 391 F. 2d 172, 176 (5th Cir. 1968), the court held that there is no fraudulent joinder unless it is clear that there can be no recovery. None of the prior cases has held that the court could weigh the evidence and resolve a disputed issue of fact. Neither the present ruling nor the ruling in *B., Inc. v. Miller Brewing Co.*, prevents a defendant from proving, if possible, that the facts asserted are so clearly false as to demonstrate that no factual basis existed for any honest belief on the part of the plaintiff that there was a valid claim. The court merely recognized, as have the prior decisions, that where there is a genuinely disputed factual issue, the defendant will be unable to prove what is required for a finding of fraudulent joinder.

It must be stressed that the only issue at this point is whether a writ of certiorari should be granted. It is clear that the rule of law applied below is not in conflict with the rules developed in other Circuits or in this Court. Rather, the Fifth Circuit has followed rules consistent with those developed elsewhere. The present case does not involve an important unsettled issue of federal law. Rather, the applicable rules of law have been settled for many years by rulings of this Court and the lower federal courts. There is no important issue of federal law to be resolved by this Court.

The Fifth Circuit simply has not done what defendants suggest. It has not prevented defendants from submitting evidence on the fraudulent joinder issue and has not prevented the defendants from piercing the pleadings. It has merely applied a longstanding rule which prevents a defendant from "pre-trying" a genuinely disputed issue of material fact. Had the affidavits offered by defendants stood undisputed, a different case would have been presented. Review of the ruling below, pursuant to the applicable rules of law, would amount to no more than review of the question whether there really was a genuine dispute as to the facts which would prevent summary disposal of the case. This is hardly a matter of such significance that it must be resolved by this Court. Although of importance to the parties in the case, the significance of the Fifth Circuit ruling does not extend beyond the present case. There is no reason why this Court should be required to determine whether there is a genuinely disputed issue of material fact, or whether the Mississippi state courts might recognize a cause of action in this case.

At any rate, it is clear that reversal by the Fifth Circuit was proper in this case. Defendants assert that plaintiff's evidence was irrelevant. However, plaintiff offered evidence relating directly to Stricklin's personal involvement in the acts alleged. Defendants claim that plaintiff's evidence was hearsay and could be disregarded. However, the depositions of corporate employees were hearsay only in the same sense that the affidavits submitted by defendants were hearsay. Moreover, as against the corporation, which was making the claim of fraudulent joinder, any statements of corporate agents would not even be regarded as hearsay under the federal rules. Fed. R.

Evid. 801(d) (2). The depositions of two corporate employees, viewed in the light most favorable to plaintiff, directly contradict their affidavit evidence. Clearly, there was a genuine issue of fact which could not be resolved summarily. The Fifth Circuit correctly ruled that the district court acted improperly in holding an evidentiary hearing, weighing the evidence, and resolving a disputed issue of fact against plaintiff.

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### CONCLUSION

The ruling below applied well settled principles of law which have been consistently followed by the federal courts. There is no conflict among the courts and no important unsettled principle of federal law which must be resolved by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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